No. 798

FILED
MAR 8 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

CITY OF INDIANAPOLIS, a Municipal Corporation,
Petitioner and Petitioner Below,

v.

DAN H. WHEELER, Acting Director Bituminous Coal Division of the Department of the Interior of the United States and District Board No. 8,

Respondents and Respondents Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT
AND
BRIEF IN SUPPORT THEREOF.

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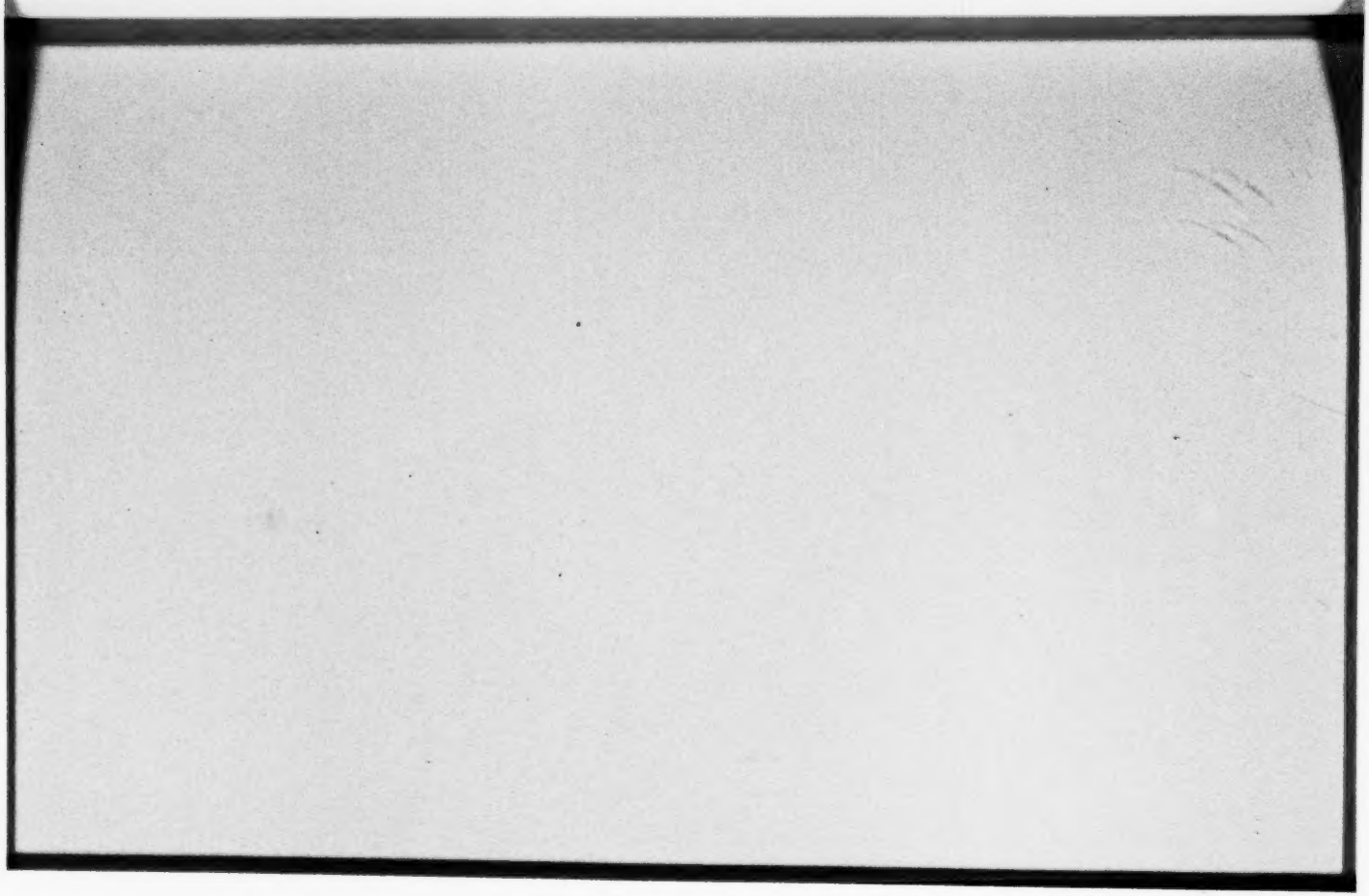

SUBJECT—INDEX

	Page
Petition for Writ of Certiorari	1-11
Summary Statement of Matters Involved	1-4
Jurisdiction	4, 9
Statement of the Facts	5-9
Questions Presented	9, 10
Reasons Relied Upon for Allowance of Writ	10, 11
Prayer	11
Brief	12-21
Opinion of Court Below	12
Jurisdiction	12
Statement of the Case	12
Assignments of Error	13-14
Argument	14-20
Appendix A	22, 23
Appendix B	23, 24

Table of Cases

Page

Champer v. City of Greencastle, 138 Ind. 339, 341---- 3

Chicago, etc., Co. v. Minneapolis, etc., Co., 247 U. S. 490, 62 L. Ed. 1229, 1237----------11, 17

City of South Bend v. Chicago, etc., Co., 179 Ind. 455, 457 ---------- 3

East Chicago Co. v. City of East Chicago, 171 Ind. 654, 658 ---------- 3

Gray v. Powell, 314 U. S. 402, 86 L. Ed. 301--4, 9, 10,13, 14,15

Hyre, Admr., v. Brown, 102 W. Va. 505, 135 S. E. 656, 49 A. L. R. 1230, 1238---------- 3

Securities & Exchange Commission v. Chenery Corp., 87 Adv. Opinions L. Ed. 411, and cases cited----- 20

Todd v. Citizens Gas Co., 46 F. (2d.) 855---------- 2

Statutes

Page

Burns' Ind. Statutes Ann. 1933, Sec. 48-7103--------- 2, 21

Burns' Ind. Statutes Ann. 1933, Sec. 48-7101--------- 16

Burns' Ind. Statutes Ann. 1933, Sec. 60-219----------10, 20

Sec. 4 II (1) Bituminous Coal Act of 1937-------2, 9, 13, 16

Sec. 240 (a) Judicial Code (43 Stat. 938; 28 U. S. C. Sec. 347) ----------4, 14, 16

Texts

Page

Wormser, The Disregard of the Corporate Fiction---- 11

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AND

BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The City of Indianapolis, a municipal corporation, shows to the Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

1. On May 7, 1940, petitioner filed an application with

the Bituminous Coal Division of the Department of the Interior to have its status as a producer-consumer determined (R. 7-21) under Section 4 II (1) of the Bituminous Coal Act (Title 15, Sec. 833 (1) U.S.C.A.) and to procure a determination that it was exempt from the provisions of the Act, in respect of the coal mined by the Milburn By-Products Coal Company (consumed by petitioner) which operates a mine at Milburn, West Virginia (R. 8, 14, 18). The coal so produced by Milburn then constituted approximately 70% of its output (R. 48 and 59).

(a) No exemption was sought by applicant in respect of coal mined and sold to others.

2. The City of Indianapolis is the successor trustee of a Public Charitable Trust, which owns and operates a by-product coke plant in Indianapolis (R. 11 and 12) and 70% of the coal produced by Milburn is consumed by the City in the production of gas and coke, which Congress has never undertaken to regulate.

3. For a statement of the powers and duties of the City of Indianapolis, as such successor trustee, see:

Todd v. Citizens Gas Co., 46 F. (2d) 855.

4. The City of Indianapolis has express statutory authority to acquire and operate the coal mining property in question through the medium of stock ownership (R. p. 49; Burns' Indiana Statutes Annotated 1933, Sec. 48-7103) and Milburn is operated so as to meet the exact costs of production so far as they can be ascertained. (R. p. 111.)

5. The City of Indianapolis under both the law of Indiana and West Virginia has no authority or right to operate a coal mine in West Virginia as a municipal subdivision

Champer v. City of Greencastle, 138 Ind. 339, 341;

East Chicago Co. v. City of East Chicago, 171 Ind. 654, 658;

City of South Bend v. Chicago, etc., Co., 179 Ind. 455, 457;

Hyre, Admr., v. Brown, 102 W. Va. 505, 135 S. E. 656, 49 A.L.R., 1230, 1238.

(a) The City of Indianapolis was not, therefore, operating the coal mine in West Virginia as a matter of choice through the medium of Milburn, but as a matter of necessity.

6. The trial examiner and the acting Administrator of the Bituminous Coal Division held:

(a) That Milburn was not a mere "shell," but is a subsidiary to the City of Indianapolis and supplies coal to such city in its capacity as operator of its by-product coal plant;

(b) That the request for exemption should be denied;

(c) That the *form* under which the City operated, "carries with it consequences that could be avoided under some other form" (R. 301, 362).

(d) That the corporate identity of Milburn would not be disregarded (R. 363) and that because the operation of Milburn was under the supervision of its General Manager, the City of Indianapolis could not "claim to be a producer within the meaning of Section 17(c) when it possess none of the

appliances of production, owning neither the mines nor the equipment necessary for mining." (R. 363.)

7. The Circuit Court of Appeals affirmed the decision of the Acting Director holding, as we submit, under a wholly mistaken interpretation of the decision of this Court in *Gray v. Powell*, 314 U. S. 402, 86 L. Ed. 301, that it was "*without authority to overrule the determination made by the Administrator* * * * (and) *without authority to make a decision contrary to that of the administrator* * * *" (R. 399.)

(a) The Circuit Court of Appeals thus failed to follow the test laid down by this Court that the courts will examine an administrative order to determine whether there had been "an application of the statute in a just and reasoned manner" and a "sensible exercise of judgment." It merely refused to examine the order at all. (R. p. 396.)

All questions here presented were urged on the Circuit Court of Appeals.

This writ is prosecuted to review the decision of the Circuit Court of Appeals.

II.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 C. 228 (43 Stat. 938; 28 U.S.C. Sec. 347). This petition for certiorari was filed before the expiration of three months from January 29, 1943, the date of the decision of the Circuit Court of Appeals. (R. p 399.)

III.

STATEMENT OF THE FACTS.

In 1912 Milburn Coal Company, a West Virginia corporation, was formed for the purpose, among others, of conducting coal mining operations in the Eagle and Powelton seams, at Milburn, Fayette County, West Virginia. (R. 48.)

In October, 1913, when mining operations were commenced, Milburn Coal Company entered into a contract with Citizens Gas Company, a quasi-public Indiana corporation, by the terms of which the mine was to furnish to the Gas Company all of the coal required by the latter in the operation of its artificial gas plant. (R. 164-193.)

Early in 1917 Citizens Gas Company commenced active negotiations for the purchase of Milburn Mining Company. At a meeting of the Board of Directors of Citizens Gas Company held on November 22, 1917, a resolution was adopted which proposed that the secretary be instructed to continue his investigation of the Milburn Coal proposition and consult with counsel regarding the modification of the existing contract so as to make the contract obligations a lien on the property in order to safeguard this company's interest in event of the sale of the mine by the present owners if this company does not purchase the same. (R. 242-245.)

At the December 15, 1917, meeting of the Board of Directors, counsel was instructed to draw the necessary papers for the consummation of the purchase of Milburn Coal Company. The matter of the purchase was submitted to the Board of Trustees. At a meeting held on December 10, 1917, the recommendation of the Board of Directors was unanimously approved.

Because of problems of financing the purchase of Milburn Coal Company it was decided to form Milburn By-Products Coal Company. This was done on January 27, 1918. (R. 162, Exhibit 1.) By using available cash and the money from the sale of bonds, Milburn By-Products Coal Company purchased Milburn Coal Company.

The outstanding capital stock of Milburn By-Products Coal Company become the property of the City at the time of the transfer by Citizens Gas, viz: September 9, 1935. (R. 70.)

With an artificial gas plant and a distribution system upon which the gas users of Indianapolis as beneficiaries of the public charitable trust depended, the maintenance of a coal supply was of vital importance to the city. (R. 14, 47, 48.)

The chemical contents of the coal mined at Milburn, West Virginia, is such that it ranks as the highest grade of coking coal. (R. 122.) There are a few other fields of bituminous coal that are of the quality of that at Milburn. Most, if not all, other fields of this quality coal are now owned by others and the coal mined therefrom is not available to Citizens Gas & Coke Utility. It is not for sale. The coal available on the market is of such quality that it will not give the the same high yield of by-product coke of the quality now produced.

Without coal from the Milburn field Citizens Gas & Coke Utility would be unable to furnish gas to the gas users of Indianapolis at the same price as now furnished. Thus, to be deprived of the use of Milburn coal would result in a hardship, not alone on the Utility, but upon all of the gas users in Indianapolis. (R. 122.)

The City was not desirous of maintaining the corporate entity of Milburn By-Products Coal Company but would have preferred the outright ownership of the physical properties. (R. 52.) Counsel for the Utility District of the City requested an opinion from Brown, Jackson and Knight, attorneys of Charleston, West Virginia, as to whether or not the City of Indianapolis could own and operate mining properties in West Virginia, a foreign state. (R. 52.)

Under date of April 15, 1936, an opinion was received which advised the City of Indianapolis that doubt existed "whether the public policy of West Virginia would permit the operation of a coal mining property in the State by a foreign municipal corporation." (R. 221-224, Exhibit 13.)

In accordance with the opinion of West Virginia counsel, the corporate entity of Milburn By-Products Coal Company has since been maintained. It has been maintained, solely because of the inability, for legal reasons, of the City to own and operate the physical property of Milburn in a foreign state. (R. 52.)

The legal fiction of the corporate entity of Milburn is maintained for the sole and only purpose of enabling the City to assure its Department of Utilities of an adequate coal supply of the kind and character of coal necessary to a successful operation of Citizens Gas & Coke Utility in accordance with the terms of the trusteeship. Mr. A. A. Gallagher, who is the general manager of Milburn, is limited in his authority to the bare operation of the property, and has no power to make any improvements without the consent of the Board of Directors of Milburn. (R. 53.)

The Board of Directors of Milburn is the Board of Directors of the Department of Utilities of the City of Indi-

anapolis. Mr. Henry L. Dithmer is president of both boards; Mr. Brodehurst Elsey is vice-president of both boards; Mr. Isaac Woodward is treasurer of both boards; Mr. Roy Sahm is secretary of both boards, Mr. Thomas L. Kemp is general manager of Citizens Gas & Coke Utility and assistant to the president of Milburn. It is to him that Mr. Gallagher must report, and from him that Mr. Gallagher takes direction. Mr. Victor Seiter is assistant secretary of the Utilities District and assistant secretary of Milburn; Mr. V. V. Smith is assistant treasurer of the Utility, and holds the same office with Milburn. (R. 44, 49, 50, 51.)

No member of the board of directors of Milburn receives a salary as such director but is paid a statutory allowance as a member of the Board of Directors for Utilities of the City of Indianapolis. (R. 51, 45.) Neither Thomas L. Kemp, Victor C. Seiter, nor V. V. Smith receives any salary from Milburn in exchange for the services given Milburn by them. The compensation which each receives from the Department of Utilities is considered to be remuneration for the additional services each renders Milburn. (R. 51, 149.)

While the principal place of business of Milburn is maintained at Milburn, West Virginia, a branch office of the company is established and maintained in the Majestic Building in the City of Indianapolis, which is the building which houses the executive offices of the Citizens Gas & Coke Utility. The by-laws of Milburn provide that the annual meeting of the stockholders shall be held at the branch office of the company at Indianapolis, Indiana. (R. 235, Exhibit 24.)

While Milburn maintains a bookkeeper at the mine, annual detailed audits of the Milburn books are made by the auditor of the Utilities District. (R. 149.) Furthermore,

Milburn is subject to audit by the Indiana State Board of Accounts. (R. 47.)

The salaries of the clerks and other office employees of Milburn are subject to the approval of Thomas L. Kemp, assistant to the president of Milburn and general manager of Citizens Gas & Coke Utility. (R. 55.)

Milburn makes daily and monthly reports to the Department of Utilities of the City of Indianapolis, which includes the tonnage mined and shipped, and various other items. (R. 49.)

Mr. Kemp, general manager of Citizens Gas & Coke Utility, testified as to the undisputed fact that the business policies and the actual charge, supervision and direction of Milburn's affairs are in the Board of Directors of the Department of Utilities of the City of Indianapolis. (R. 53, 54.)

IV.

THE QUESTIONS PRESENTED.

Upon the record and opinion of the Circuit Court of Appeals, three important federal questions are presented:

First. Whether on the undisputed facts and law, the City of Indianapolis is a producer-consumer within Section 4 II (1) of the Bituminous Coal Act of 1937.

Second. Whether the Circuit Court of Appeals for the Seventh Circuit misconstrued and misapplied the decision of this Court in *Gray v. Powell*, 314 U. S. 402, 86 L. Ed. 301, by refusing to examine the decision of the Acting Director of the Bituminous Coal Division to determine whether he had applied the statute in a just and reasoned manner and had made a sensible exercise of judgment.

Third. Whether the decision of an administrative board may not even be examined by the courts for the purpose of determining whether it has correctly followed the applicable law.

V.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The Circuit Court of Appeals for the Seventh Circuit has decided three Federal questions in conflict with the decisions of this court:

First. It refused to examine the decision of the Acting Administrator of the Bituminous Coal Division to determine whether he had applied the statute in a just and reasoned manner and had made a sensible exercise of judgment.

Gray v. Powell, 314 U. S. 402, 86 L. Ed. 301.

Second. It held, in substance, that Courts are bound by any determination of an administrative board, even though based upon undisputed facts and undisputed legal propositions and are absolutely without power to examine such orders. This is in direct opposition to the rulings of this Court.

Gray v. Powell, 314 U. S. 402, 86 L. Ed. 301;

Securities & Exchange Commission v. Chenery Corporation, 87 Advance Opinions L. Ed. 411.

Third. It held, in substance, that the City of Indianapolis, although it did not voluntarily choose to operate a mine in West Virginia through the medium of a wholly owned subsidiary, but was obliged to do so by reason of operation of law was thereby precluded from exemption as a producer-consumer.

(a) This was a decision on a question of law, not a question of fact, and is reviewable by this Court.

(b) Under the circumstances of this case, the Acting Director of the Bituminous Coal Division and the Circuit Court of Appeals should have disregarded the corporate fiction of Milburn.

Wormser, The Disregard of the Corporate Fiction, page 10;

Chicago, etc., Co. v. Minneapolis, etc., Co., 247 U. S. 490, 62 L. Ed. 1229, 1237.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of the Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in the case numbered and entitled on the docket of said United States Circuit Court of Appeals, No. 8015 and entitled City of Indianapolis, petitioner, versus Dan H. Wheeler, Acting Director Bituminous Coal Division of the Department of the Interior and District Board No. 8 and that the decree of the United States Circuit Court of Appeals for the Seventh Circuit in said cause be reversed by this Court, and that petitioner have such other and further relief in the premises as this Court may seem just.

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Respondents and Respondents Below.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is found in the record, pages 396 to 399.

II.

JURISDICTION.

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction is set out in the Petition for a Writ of Certiorari at pages 4 and 9.

III.

STATEMENT OF THE CASE.

A full statement of the case having been given in the Petition for a Writ of Certiorari, in the interest of brevity is not here repeated.

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals for the Seventh Circuit erred in each of the following particulars:

First. In holding that it was without power or authority to overrule the determination of the Acting Administrator of the Bituminous Coal Division that the City of Indianapolis was not a producer-consumer within the meaning of Section 4, II (1) of the Bituminous Coal Act.

Second. In refusing to examine the ruling and determination of the Acting Administrator to determine whether he had applied the Bituminous Coal Act in a just and reasoned manner and had made a sensible exercise of judgment.

Third. In construing the decision of this Court in *Gray v. Powell,* 314 U. S. 402, 86 L. Ed. 301, as preventing any examination under any circumstances of the order of an Administrative Board, even on an established and undisputed question of law.

Fourth. In holding, in substance, that where, as here, the City of Indianapolis was compelled as a matter of law, not as a matter of choice, to operate a coal mine in West Virginia through a wholly owned subsidiary, pursuant to legislative authority, that the corporate fiction would not be disregarded and that an exemption as producer-consumer would be denied.

Fifth. In upholding and sustaining an arbitrary

and unwarranted exercise of administrative power, based on an unlawful disregard of undisputed facts and principles of law and involving the application of the Bituminous Coal Act in an unjust and unreasonable manner.

V.

ARGUMENT.

A.

Complete jurisdiction in the Supreme Court of the United States is shown by the record, since this is a civil case in the United States Circuit Court of Appeals for the Seventh Circuit. The petition was a party (R. P. 1); Judicial Code Section 240(a)„ amended Feb. 13, 1925. (C. 229, 43 Stat. 938, 28 U. S. C. A. 347.)

B.

The Circuit Court of Appeals has completely disregarded the ruling of this Court in *Gray v. Powell,* 314 U. S. 402, 86 L. Ed. 301, in which it was held that the action of an administrative officer would not be re-examined by the courts even on undisputed testimony if the administrative officer *had made an application of the statute in a just and reasoned manner and had exercised a sensible judgment.*

In this case, the Circuit Court of Appeals *refused to examine the administrative order at all.* This clearly appears from the concluding paragraph of the opinion (R. P. 399) which reads as follows:

> *"Obligated as we are to follow the pronouncement of the Supreme Court, we must hold that we are without authority to overrule the determination*

> *made by the administrator. Without authority to make a decision contrary to that of the Administrator, no purpose could be served in relating the undisputed facts upon which petitioner relies for relief. The order sought to be reviewed is, therefore, approved.*" (Our emphasis.)

At another place in its opinion the Circuit Court of Appeals said:

> "* * * * It is argued, however, that the language 'and an application of the statute in a just and reasoned manner' *gives us the authority to decide differently from the determination made by the Administrator. With this argument we do not agree.* In this connection, it is pertinent to observe that the so-called evidentiary facts in the case before the Supreme Court, as in the instant case, were not in dispute. The sole issue there, as here, was the ultimate conclusion of the Administrator that the applicant was not the producer of the coal."
> (Our emphasis.) (R. P. 398.)

The above quoted statements show, we submit, a complete misunderstanding of the decision of this court in *Gray v. Powell*, 314 U. S. 402, 86 L. Ed. 301, and, if it states the applicable law, would require the affirmance of all administrative orders, although made in violation not only of the undisputed facts but of the admitted law. Such an interpretation would permit any administrative board to exercise arbitrary and unreasoned power, to disregard the scope and purpose of the Act by which it was created, to apply the act in an unreasonable manner and to exercise a judgment which was not sensible and yet its order could not even be scrutinized by a court.

Surely, the doctrines of administrative law have not yet carried us thus far. We submit that a decision of such far reaching scope should be reviewed by this court.

The statute creating the Department of Utilities of the City of Indianapolis provides in Sections 41-7101 Burns' Indiana Statutes Annotated 1933, et seq, that the Board of Directors for Utilities shall have power to preserve the corporate organization of any company engaged in the mining of coal, the stock of which may be owned by any utility whose property and assets may be taken over by any such city either in absolute ownership or in trust and that

> "through the control thus given of any company, the Board of Directors for Utilities shall be authorized to do all things necessary to cause any such coal mining company or other company efficiently to carry on its operations and to conduct its business in the same manner as if its stock were owned by private individuals."
>
> (See Appendix B where the pertinent subsection is set out in full.)

Here, then, is a legislative provision expressly authorizing the operation of the Milburn By-Products Coal Company by the city as a wholly owned subsidiary and recognizing that such operation through the medium of stock ownership is a municipal function. In the opinion of the Circuit Court of Appeals this statute is not even referred to or considered, although its apparent bearing on the determination of the case was presented to the Court.

The City of Indianapolis having no power to do business in West Virginia, was compelled to maintain the fiction of the corporate entity of Milburn By-Products Coal Company to assure a coal supply for the continued proper discharge of its trust duties. Under such circumstances the corporate entity of Milburn will be disregarded and the City held a producer-consumer of coal within the meaning of Section 4 II (1) of the Bituminous Coal Act of 1937.

The City does not voluntarily maintain the corporate entity of Milburn. It is not here a question of a free choice of a method of doing business. In fact, the City would have preferred to dispense with the operation of Milburn and to have produced the coal directly itself (R. 52).

Under such circumstances the corporate fiction of Milburn should be disregarded to accomplish a just and proper result.

Professor Wormser, in his outstanding treatise "The Disregard of The Corporate Fiction," said at page 10:

> " 'It is a certain rule,' said Lord Mansfield when Chief Justice of England, 'that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.' Fictions are invented and instituted for the advancement and promotion of justice, and will be applied for no other purpose. No sound reason can be perceived why the principles applicable to fictions in general should not apply to the fiction that a corporation is a person in the eye of the law. A person *in fact* it is *not;* a person *in law* it *is,* except in cases where the fiction is urged for perverted and fraudulent purposes." (Our emphasis.)

In *Chicago, Milwaukee & St. Paul Railway Company v. Minneapolis Civic & Commerce Assoc.,* 247 U. S. 490, 62 L. Ed. 1229, 1237, it was said:

> "Much emphasis is laid upon statements made in various decisions of this court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two. * * * *
>
> While the statements of the law thus relied upon

> are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. * * * *
>
> In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

Where a wholly owned and controlled coal mining subsidiary, not voluntarily maintained, does not function as an ordinary corporation but in reality as a mere department of the municipality owning it, furnishing coal to enable the latter to perform its duties as a trustee of a public trust, the subsidiary is the mere agent of the municipal corporation and the latter is a producer-consumer of the coal which it consumes.

In reality Milburn By-Products Coal Company is the City of Indianapolis. Mr. A. A. Gallagher, who is the general manager of Milburn, is limited in his authority to the bare operation of the property, and has no power to make any improvements without the consent of the Board of Directors of Milburn. (R. 53.) The Board of Directors of Milburn is the Board of Directors of the Department of Utilities of the City of Indianapolis. Mr. Henry L. Dithmer is president of both boards; Mr. Brodehurst Elsey is Vice-President of both boards; Mr. Isaac Woodard is treasurer of both boards; Mr. Roy Sahm is secretary of both boards; Mr. Thomas L. Kemp is general manager of Citizens Gas & Coke

Utility and assistant to the president of Milburn. It is to him that Mr. Gallagher must report, and from him that Mr. Gallagher takes directions. Mr. Victor Seiter is assistant secretary of the Utilities District and assistant secretary of Milburn; Mr. V. V. Smith is assistant treasurer of the Utility, and holds the same office with Milburn. (R. 49, 51.)

No member of the board of directors of Milburn receives a salary as such director but is paid a statutory allowance as a member of the Board of Directors for Utilities of the City of Indianapolis. Neither Thomas L. Kemp, Victor C. Seiter, nor V. V. Smith receives any salary from Milburn in exchange for the services given Milburn by them. The compensation which each receives from the Department of Utilities is considered to be remuneration for the additional services each renders Milburn. (R. 51, 52.)

While the principal place of business of Milburn is maintained at Milburn, West Virginia, a branch office of the company is established and maintained in the Majestic Building in the City of Indianapolis, which is the building which houses the executive offices of the Citizens Gas & Coke Utility. (R. 55.) The by-laws of Milburn provide that the annual meeting of the stockholders shall be held at the branch office of the company at Indianapolis, Indiana. (R. 235, Exhibit 24.)

While Milburn maintains a bookeeper at the mine, annual detailed audits of the Milburn books are made by the auditor of the Utilities District. (R. 149.) Furthermore, Milburn is subject to audit by the Indiana State Board of Accounts (R. 47) which was created by Chapter 55 of the Acts of the Indiana General Assembly of 1909, as amended by Chapter 72 of the Acts of 1915. (Burns' Indiana Statutes

Annotated, 1933, Sec. 60-219.) Section 17 of this Act provides among the definitions, that:

> "The term 'public service industries', as used in this Act shall be construed to extend to, include and mean any and all public service industries owned either directly by the municipality * * * or the capital stock of which the municipality may be the owner of in part, or the bonds of which may be owned or guaranteed by the municipality."

In *Securities & Exchange Commission v. Chenery Corporation,* 87 Advance Opinions L. Ed. 411, decided February 1, 1943, this Court had the following to say in speaking of limitations upon orders of administrative boards:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. *But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."* (Our emphasis.)

Here, the acting administrator undertook to and did decide a legal question, viz: whether the corporate fiction of Milburn would be disregarded and reached his conclusion that the City of Indianapolis was not a producer-consumer because it was operating through the medium of Milburn. If you strip his order of the legal conclusion, it follows conclusively that the exemption should have been granted.

The coal produced by the City through the medium of Milburn By-Products Coal Company and consumed by the City does not fall within the purpose and scope of the Bituminous Coal Act. The coal is not marketed, is not in com-

petition with other coal, and Congress has not sought to regulate the production or sale of either artificial gas or coke. There is printed as Appendices A and B the pertinent provisions of the Bituminous Coal Act authorizing exemptions and Section 48-7103 Burns' Indiana Statutes Annotated which authorizes the City of Indianapolis to own the capital stock of Milburn and through such ownership to operate the business of Milburn.

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